TERAS KIMIA SDN BHD v. GOVERNMENT OF MALAYSIA

HIGH COURT MALAYA, KUALA LUMPUR
WONG KIAN KHEONG JC
[SUIT NO: 21NCC-1-05-2012]
10 APRIL 2014

CIVIL PROCEDURE: *Government proceedings – Monetary judgment against government – Notice of application for certificate to be issued under s. 33(1) of Government Proceedings Act 1956 (GPA) – Whether notice of application duly served on Attorney General's Chambers – Hearing of application in absence of Federal Counsel – Order in terms granted by court – Whether order in terms (court order) regularly obtained – Whether court order constituted a judgment in default – Whether O. 73 r. 7(1) Rules of Court 2012 (ROC) could be relied on to set aside court order*

CIVIL PROCEDURE: *Functus officio – Application to set aside – Notice of application for certificate to be issued under s. 33(1) of GPA – Whether O. 32 r. 5(3) ROC a statutory exception to functus officio doctrine – Whether court conferred power to re-hear notice of application*

CIVIL PROCEDURE: *Time – Computation of – Notice of application for certificate to be issued under s. 33(1) of GPA – Time requirement to serve notice of application – Reckoning of two clear days time period as specified in O. 32 r. 3 of ROC – Whether should be construed in accordance with O. 3 r. 2 of ROC – Whether s. 54(1) Interpretation Acts 1948 and 1967 ('IA') applicable*

STATUTORY INTERPRETATION: *Construction of statutes – Ambiguity – Purposive interpretation – Reckoning of time period of seven days or less – Exclusion of Saturdays – Whether O. 3 r. 2(5) ROC excluded Saturday in reckoning period of seven days or less*

STATUTORY INTERPRETATION: *Definitions – 'Weekly holiday' – Whether weekly holidays included Saturday under O. 3 r. 2(5) ROC*

The plaintiff had earlier commenced an action against the defendant and had obtained a judgment against the defendant on 18 March 2013. The defendant subsequently appealed to the Court of Appeal and the said appeal was dismissed on 5 December 2013. In dismissing the said appeal, the Court of Appeal had also made a variation to the judgment of the High Court ('judgment sum'). The plaintiff's solicitors demanded to the Attorney General's Chambers ('AGC') for the defendant to pay the plaintiff the said judgment sum. As the defendant did not pay the said judgment sum, the plaintiff had on 22 April 2014, filed a notice of application ('encl. 30') for a certificate ('certificate') to be issued under s. 33(1) of the Government Proceedings Act 1956 ('GPA'). Enclosure 30 was fixed for hearing on Tuesday, 6 May 2014. A sealed copy of encl. 30 was served to the AGC on

Wednesday, 30 April 2014. As 1 May 2014 was a public holiday, the plaintiff's counsel had on 2 May 2014, *via* a telephone conversation informed the Senior Federal Counsel ('SFC') about the hearing date fixed for encl. 30. On 6 May 2014, the court proceeded to hear encl. 30 in the absence of the SFC and granted order in terms for encl. 30 ('court order dated 6 May 2014'). On 14 May 2014, the defendant filed the present application ('encl. 32') to set aside court order dated 6 May 2014 pursuant to O. 73 r. 7(1) of the Rules of Court 2012 ('ROC'). The issue that arose for the court's determination was whether the plaintiff had complied with O. 32 r. 3 of the ROC in obtaining court order dated 6 May 2014. As such, the court was required to; (i) interpret the time period of two clear days for service of a notice of application as required by O. 32 r. 3 of the ROC when the time period in question included a public holiday and a weekend; and (ii) whether the court could re-hear court encl. 30 under O. 32 r. 5(3) of the ROC.

Held (allowing encl. 32 and setting aside the court order dated 6 May 2014 with no order as to costs; encl. 30 ordered to be re-heard):

(1) O. 3 r. 2(1) of the ROC expressly provides that any time period fixed by the ROC shall be construed in accordance with O. 3 r. 2 of the ROC. As such, s. 54(1) of the Interpretation Acts 1948 and 1967 ('IA') cannot apply to reckon the two clear days' time period specified in O. 32 r. 3 of the ROC. O. 3 r. 2 of the ROC is the express provision to the contrary. (para 25)

(2) The construction of O. 32 r. 3 of the ROC based on O. 3 r. 2 ROC is a question of law which is not dependent on the telephone conversation. O. 3 r. 2(2) of the ROC excludes 30 April 2014 (the day of service of court encl. 30 on AGC) from the computation of the two clear days' time period. (para 27)

(3) It is clear that O. 3 r. 2(5) of the ROC excludes public holiday from the computation of a period of seven days or less. Based on O. 3 r. 2(5) of the ROC, the public holiday on 1 May 2014 is excluded in the reckoning of two clear days' time period prescribed in O. 32 r. 3 of the ROC. Section 2 of the Holidays Act 1951 ('HA') interprets 'weekly holiday' to mean Sunday or, in states where Friday is observed as the weekly holiday. Section 2 of the ('IA') gives the same definition of a weekly. The meaning of 'weekly holiday' in s. 2 of the HA and s. 3 of the IA is adopted for the purpose of the construction of 'weekly holidays' under O. 3 r. 2(5) of the ROC. As such, Saturdays are not weekly holiday in O. 3 r. 2(5) of the ROC even though Saturdays are generally not working days and the court 'Registry' (as defined in O. 1 r. 4(1) of the ROC) is closed on Saturdays. (para 27)

(4) The fact that Saturdays are ordinarily not working days in Malaysia is the subject of common and general knowledge and its existence or operation is accepted by the public without qualification or contention. If parties and solicitors generally do not work on Saturdays and the court's registry is also closed on Saturdays, it would be unjust to include Saturdays in the computation of a time period of seven days or less. Accordingly, a purposive approach is adopted of O. 3 r 2(5) of the ROC to exclude Saturdays from the reckoning of a time period of seven days or less. (para 27)

(5) O. 3 r. 2(4) of the ROC had been complied with in this case. This is because at least two working days *ie*, Friday, 2 May 2014 and Monday, 5 May 2014 have intervened between the day of service of encl. 30 on the AGC on Wednesday 30 April 2014 and its hearing on Tuesday 6 May 2014. Enclosure no. 30 has been duly served on the AGC as required by O. 32 r. 3 of the ROC as interpreted by O. 3 r. 2(1), (2), (4) and (5) of the ROC. As such, court encl. 32 cannot succeed under O. 2 r. 2(1) of the ROC as the court order dated 6 May 2014 has been obtained regularly by the plaintiff. (paras 27 & 28)

(6) O. 32 r. 5(3) of the ROC is a statutory exception to the *functus officio* doctrine. This is clear from the words 'whether or not an order made on the hearing has been perfected' in O. 32 r. 5(3) of the ROC. Order 32 r. 5(3) of the ROC expressly confers power on the court to re-hear a notice of application provided that two conditions are fulfilled *ie*, (i) the order in question has been made in the absence of a party; and (ii) it is just for the court to re-hear the notice of application in question. If the two conditions are met, the court has the necessary power pursuant to s. 40(1) of the IA to set aside court order dated 6 May 2014 and to re-hear encl. 30. The two conditions have been met in this case. (paras 33 & 34)

Case(s) referred to:

Aje Best-On Sdn Bhd v. YB Ahmad Omar & Anor [2000] 3 CLJ 515 HC ***(refd)***

Arab-Malaysian Bank Bhd v. Marina Mohd Yusoff [1999] 3 CLJ 633 HC ***(refd)***

Asia Commercial Finance (M) Bhd v. Kawal Teliti Sdn Bhd [1995] 3 CLJ 783 SC ***(refd)***

Bank Utama (Malaysia) Bhd v. Seri Mayhua Sdn Bhd & Ors [2000] 1 LNS 82 HC ***(refd)***

Credit Corporation Malaysia Bhd v. Saraswathi Narayanan & Ors [1999] 7 CLJ 459 HC ***(refd)***

Hong Leong Bank Bhd v. Staghorn Sdn Bhd & Other Appeals [2008] 2 CLJ 121 FC ***(refd)***

Indah Water Konsortium Sdn Bhd v. Yong Kon Fatt [2007] 4 CLJ 613 CA ***(refd)***

Lee Lim Huat v. Yusuf Khan Ghows Khan & Anor [1997] 3 CLJ 197 CA ***(refd)***

Minister of Finance Government of Sabah v. Petrojasa Sdn Bhd [2008] 5 CLJ 321 FC ***(refd)***

Morgan Guaranty Trust Co of New York v. Lian Seng Properties Sdn Bhd & Anor [1989] 1 CLJ 452; [1989] 2 CLJ (Rep) 133 HC ***(refd)***

Pembangunan Maha Murni Sdn Bhd v. Jururus Ladang Sdn Bhd [1985] 1 LNS 122 SC ***(foll)***

A *Re Stephen Wong Leong Kiong; Ex P HSBC Bank Malaysia Bhd [2005] 5 CLJ 504 HC* ***(refd)***
RIH Services (M) Sdn Bhd v. Tanjung Tuan Hotel Sdn Bhd [2002] 3 CLJ 83 CA ***(foll)***
United Malayan Banking Corp Bhd v. Syarikat Perumahan Lunas Sdn Bhd [1988] 1 LNS 143 HC ***(foll)***
Westminster City Council v. Government of the Islamic Republic of Iran [1986] 3 All ER 284 ***(foll)***

B **Legislation referred to:**
Government Proceedings Act 1956, ss. 33(1), (2), (4)
Holidays Act 1951, ss. 2, 3
Interpretation Acts 1948 and 1967, ss. 2(1)(e), (3)(a), 3, 40(1), 54(1)
Rules of Court 2012, O. 1 r. 4(1), O. 2 r. 2(1), O. 3 r. 2(1), (2), (4), (5), O. 21
C r. 6, O. 32 rr. 3, 5(1), (2), (3), 13(2)(b), O. 42 r. 13, O. 73 rr. 1(1), 7(1), (3), 12(1)
Rules of the High Court 1980, O. 28 r. 4(1), O. 29 r. 1(2B), O. 42 r. 13

The Civil Procedure Rules 1998 [UK], r. 2.8(4)
Rules of the Supreme Court 1965 [UK], O. 3 r. 2(5), O. 32 r. 5(1), (2)

For the plaintiff - Siew Yew Ming (Chan Mun Fei with him); M/s Raja Eleena Siew Ang
D *& Assocs*
For the defendant - Mohd Radhi Abas; SFC

Reported by Thirunavakarasu Vijayan

E **JUDGMENT**

Wong Kian Kheong JC:

Introduction

[1] This case discusses:

F (a) how to interpret the time period of two clear days for service of a notice of application (NA) as required by O. 32 r. 3 of the Rules of Court 2012 (RC) when the time period in question included a public holiday and a weekend; and

G (b) whether the court may re-hear under O. 32 r. 5(3) RC an application which has been duly served on a party and decided in the absence of that party.

Facts

[2] The plaintiff company (plaintiff) has sued the defendant, the
H Government of Malaysia (defendant), in the Kuala Lumpur High Court (this suit).

[3] After a trial of this suit, on 18 March 2013, Nallini Pathmanathan J (as Her Ladyship then was) gave judgment in favour of the plaintiff against the defendant (High Court's judgment). The defendant appealed to the Court
I of Appeal against the High Court's judgment (defendant's appeal).

[4] On 5 December 2013, the Court of Appeal dismissed the defendant's appeal but varied the High Court's judgment and ordered as follows (Court of Appeal's judgment):

(a) the defendant to pay a sum of RM59,363,919.44 to the plaintiff for services rendered by the plaintiff to the defendant (first sum);

(b) the defendant to pay the plaintiff a sum of RM5,869,394.09 in respect of the performance bond for the original contract between the plaintiff and the defendant (second sum);

(c) interest at the rate of 4% per annum on the first sum from the date of the High Court's judgment, 18 March 2013, until the date of full settlement of the first sum (post-judgment interest); and

(d) costs.

[5] The plaintiff's solicitors has demanded by way of letters dated 24 February 2014 and 26 March 2014 to the attorney general's chambers (AGC) for the defendant to pay to the plaintiff the total of the first sum, second sum, post-judgment interest and costs as ordered in the Court of Appeal's judgment (judgment sum).

[6] As the defendant did not pay the judgment sum, on 22 April 2014, the plaintiff filed a NA (court encl. No. 30) (court encl. No. 30) for a certificate (certificate) to be issued under s. 33(1) of the Government Proceedings Act 1956 (GPA). Under s. 33(1), (2) and (4) GPA read with O. 73 rr. 1(1) and 12(1) RC, the plaintiff needs the certificate before the plaintiff can execute the Court of Appeal's judgment against the defendant – please see the Federal Court's judgment in *Minister of Finance, Government of Sabah v. Petrojasa Sdn Bhd* [2008] 5 CLJ 321, at 328-329 and 339-342. Section 33(1), (2) and (4) GPA and O. 73 rr. 1(1), 12(1) and (3) RC provide as follows:

> 33(1) Where in any civil proceedings by or against the Government or in any proceedings under Chapter VIII of the Specific Relief Act 1950, or in any such proceedings as would in England be brought on the Crown side of the Queen's Bench Division, or in connection with any arbitration to which the Government is a party, any order (including an order for costs) is made by any court in favour of any person against the Government or against an officer of the Government as such, the proper officer of the court shall, on an application in that behalf made by or on behalf of that person at any time after the expiration of twenty-one days from the date of the order or, in case the order provides for the payment of costs and the costs require to be taxed, at any time after the costs have been taxed, whichever is the later, issue to that person a certificate in the prescribed form containing particulars of the order: Provided that, if the court so directs, a separate certificate shall be issued with respect to the costs (if any) ordered to be paid to the applicant.
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> ...

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33(3) If the order provides for the payment of any money by way of damages or otherwise, or of any costs, the certificate shall state the amount so payable, and the appropriate Government shall, subject as hereinafter provided, pay to the person entitled or to his solicitor the amount appearing by the certificate to be due to him together with the interest, if any, lawfully due thereon: Provided that the court by which any such order as aforesaid is made or any court to which an appeal against the order lies may direct that, pending an appeal or otherwise, payment of the whole of any amount so payable, or any part thereof, shall be suspended, and if the certificate has not been issued may order any such directions to be inserted therein.

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C

33(4) Save as aforesaid no execution or attachment or process in the nature thereof shall be issued out of any court for enforcing payment by the Government of any such money or costs as aforesaid, and no person shall be individually liable under any order for the payment by the Government or any officer of the Government as such, of any such money or costs.

D

Order 73

rule 1(1) These Rules apply to civil proceedings to which the Government is a party subject to the following rules of this Order.

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...

rule 12(1) Nothing in Orders 45 to 52 [RC] shall apply in respect of any order against the Government.

...

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Rule 12(3) Any such certificate must be in Form 170.

(emphasis added).

[7] The Kuala Lumpur High Court's Registry fixed the hearing of court encl. No. 30 at 9am, Tuesday, 6 May 2014.

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[8] A sealed copy of court encl. No. 30 was served by the plaintiff's solicitors on AGC on Wednesday, 30 April 2014.

[9] Thursday, 1 May 2014, was a public holiday. According to an affidavit by the plaintiff's learned junior counsel, Mr Chan Mun Fei (Mr Chan), Mr Chan called the learned Senior Federal Counsel, Encik Mohd Radhi bin Abas (SFC), by telephone on Friday, 2 May 2014, and informed the learned SFC about the hearing date of court encl. No. 30 on 6 May 2014 (telephone conversation).

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[10] On Monday, 6 May 2014:

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(a) the plaintiff was represented by learned counsel, Mr Siew Yew Ming (Mr Siew) and Mr Chan;

(b) the learned SFC was not present;

(c) court encl. No. 30 was called by the High Court at about 10am. Mr Siew properly informed the court that he was still waiting for the presence of the learned SFC and Mr Chan had tried to contact the learned SFC by mobile telephone but to no avail; and

(d) the court proceeded to hear court encl. No. 30 in the absence of the learned SFC and granted an order in terms of court encl. No. 30 (court order dated 6 May 2014).

[11] On 14 May 2014, the defendant filed a NA (court encl. No. 32) (court encl. No. 32) to set aside court order dated 6 May 2014 under, among others, O. 73 r. 7(1) RC.

[12] Pending the hearing of court encl. No. 32, the defendant made two payments to the plaintiff as follows:

(a) a sum of RM60,443,315.41 was paid on 16 May 2014; and

(b) the second sum was paid on 25 July 2014.

On 12 December 2014, a sum of RM1,762,635.39 (balance sum) was still outstanding.

Basis For Court Order Dated 6 May 2014

[13] Before I discuss court encl. No. 32, the basis for the making of the court order dated 6 May 2014 should be ascertained. Order 32 r. 5 RC is relevant and is reproduced as follows:

Proceeding in absence of party failing to attend (Order 32 rule 5)

5(1) *When any party to a notice of application fails to attend on the first or any resumed hearing thereof, the Court may proceed in his absence if, having regard to the nature of the application, it thinks it is expedient to do so.*

(2) *Before proceeding in the absence of any party, the Court may require to be satisfied that the notice of application or, as the case may be, the notice of the time appointed for the resumed hearing was duly served on that party.*

(3) *Where the Court hearing an application proceeded in the absence of a party, then, whether or not an order made on the hearing has been perfected, the Court, if satisfied that it is just to do so, may re-hear the application.*

(4) Where a notice of application has been dismissed without a hearing by reason of the failure of the party who took out the notice of application to attend the hearing, the Court, if satisfied that it is just to do so, may allow the notice of application to be restored to the list.

(emphasis added)

[14] It is clear from O. 32 r. 5(1) and (2) RC that the court may hear court encl. No. 30 in the absence of the learned SFC provided that the court is satisfied that court encl. No. 30 has been "duly served" on AGC. Once a NA has been "duly served" on the opposing party:

(a) the court may proceed with the hearing of the NA in the absence of the opposing party under O. 32 r. 5(1) and (2) RC. I rely on Peter Gibson J's (as His Lordship then was) decision in the English High Court case of *Westminster City Council v. Government of the Islamic Republic of Iran* [1986] 3 All ER 284 which concerns, among others, O. 32 r. 5(1) and (2) of the then English Rules of the Supreme Court 1965 (RSC) (similar to our O. 32 r. 5(1) and (2) RC). In *Westminster City Council*, at pp. 287-288, the English High Court held as follows:

> Counsel for the city council then argued that RSC Ord 32, r 5(1) and (2) (made applicable to originating summonses by Ord 28, r 1) gave the court power to dispense with service. RSC Ord 32, r 5 provides:
>
> (1) Where any party to a summons fails to attend on the first or any resumed hearing thereof, the Court may proceed in his absence if, having regard to the nature of the application, it thinks it expedient so to do.
>
> (2) Before proceeding in the absence of any party the Court may require to be satisfied that the summons or, as the case may be, the notice of the time appointed for the resumed hearing was duly served on that party.
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> *It was submitted that r. 5(1) applied because the Iranian government had failed to attend; but the failure to attend which is referred to in r. 5(1) to my mind connotes that someone who has been duly served with a summons has failed to attend. Rule 5(2), counsel for the city council submitted, gave the court a discretion to dispense with service because of the terms of that rule '... the Court may require to be satisfied that the summons ... was duly served ...' But I do not read this rule as a power to dispense with service. To my mind it is concerned with proof of service, and it puts a party on notice that proof of service on a person not attending may be insisted on by the court*. In my judgment the rule would be in a different form if it were directed at allowing dispensation with service. There are, of course, special and express provisions in the Rules of the Supreme Court allowing dispensation with service in particular cases, and the contrast with the present rule is to my mind marked.
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> Counsel for the city council also reminded me of the wide discretion conferred on the court by RSC Ord 2, r. 1 to dispense with requirements of the rules. But I do not regard it as proper in the circumstances of the present case to treat an application, which to my mind was rightly framed as an *inter partes* proceeding, as an *ex parte* application. Of course, the rules do provide for some *ex parte* applications (see for example RSC Ord 50, r. 1(2)), but again the contrast between such a provision and the present case is marked. One would expect an express provision dealing with the matter.

In the result I find myself forced to the conclusion that I cannot rule on the question referred to the court without prior service on the Iranian government.

(emphasis added).

The English High Court insisted in *Westminster City Council* for due service of cause papers on the defendant before proceeding in the defendant's absence under O. 32 r. 5(1) and (2) RSC; and

(b) the hearing of an application in the absence of a party who has been duly served with the application, is considered to be an *inter partes* (not *ex parte*) hearing. In *Lee Lim Huat v. Yusuf Khan Ghows Khan & Anor* [1997] 3 CLJ 197, at 209, Gopal Sri Ram JCA (as His Lordship then was) decided in the Court of Appeal as follows:

Thus, in order to resolve the issue raised by Counsel before this Court, it is necessary first to determine the nature of the application upon which the respondents obtained their injunction in this case. If it was an *ex parte* application, then, the appellant would be quite right in his contention. If, on the other hand, it was an *inter partes* application, then, r. 1(2B) [of Order 29 of the then Rules of the High Court 1980] would have no relevance and the submission made to us would lack merit. As earlier observed, *the respondents' summons taken out on 4 August 1995 seeking the injunction was inter partes in nature. It was not headed as an ex parte summons. It was served on the appellant's solicitors. The absence of the appellant or his Counsel at the hearing of the summons on 2 December 1995 did not render ex parte the order made upon it by the Judge*. Order 29 r. 1(2B) has, therefore, no relevance to the present case. Hence, the argument of Counsel that the injunction had lapsed by reason of this Rule of Court has no merit whatsoever.

(emphasis added).

Basis To Set Aside Court Order Dated 6 May 2014

[15] The SFC relies on, among others, O. 73 r. 7 RC to support court encl. No. 32 to set aside the court order dated 6 May 2014. Order 73 r. 7 RC reads as follows:

Judgment in default (Order 73 rule 7)

7(1) *Except with the leave of the Court, no judgment in default of appearance or of pleading shall be entered against the Government in civil proceedings against the Government or in third party proceedings against the Government*.

(2) Except with the leave of the Court, Order 16, rule 5(1)(a) shall not apply in the case of third party proceedings against the Government.

(3) An application for leave under this rule must be made by notice of application, and the notice of application must be served not less than seven days before the return day.

(emphasis added).

[16] Order 73 r. 7(1) RC only applies to judgments in default of:

(a) entering an appearance; and

(b) filing a pleading

- which have been entered against the Government. I am of the view that O. 73 r. 7(1) RC cannot be relied on as a basis to set aside the court order dated 6 May 2014. This is because the court order dated 6 May 2014 only issues a certificate under s. 33(1) GPA in the plaintiff's favour against the defendant and does not constitute a default judgment against the defendant. Furthermore, the plaintiff has obtained the Court of Appeal's judgment against the defendant after trial in the High Court and after the dismissal of the defendant's appeal.

[17] The court that has granted the court order dated 6 May 2014, has the power to set aside the same order under the following provisions of RC:

(a) if the plaintiff has not complied with the RC in obtaining the court order dated 6 May 2014, the defendant may apply to court to set aside the court order dated 6 May 2014 under O. 2 r. 2(1) RC read with O. 42 r. 13 RC; or

(b) if the court order dated 6 May 2014 has been obtained regularly by the plaintiff in the sense that there has been no breach of the RC by the plaintiff, the defendant may still make an application to court to set aside the court order dated 6 May 2014 under O. 32 r. 5(3) RC read with O. 42 r. 13 RC.

[18] Order 2 r. 2 and O. 42 r. 13 RC provide as follows:

Application to set aside for irregularity (Order 2 rule 2)

2(1) An application to set aside any proceedings, any step taken in any proceedings or any document, judgment or order therein for non-compliance with these Rules shall not be allowed unless the application is made within a reasonable time and before the party applying has taken any fresh step after becoming aware of the irregularity and the non-compliance has occasioned a substantial miscarriage of justice or occasioned prejudice that cannot be cured either by amendment or an appropriate order for costs.

2(2) An application under this rule may, after notice of the irregularity has been given to the other party, be made by notice of application and the grounds of objection shall be stated therein.

Setting aside or varying judgment and orders (Order 42 rule 13)

13. *Save as otherwise provided in these Rules, where provisions are made in these Rules for the setting aside or varying of any order or judgment, a party intending to set aside or to vary such order or judgment shall make an*

application to the Court and serve it on the party who has obtained the order or judgment within thirty days after the receipt of the order or judgment by him.

(emphasis added).

[19] It is my view that any application to set aside any previous order or judgment to the same court which has pronounced that order or judgment, should comply with O. 42 r. 13 RC. I cite the judgment of Abdul Hamid Mohamad CJ in the Federal Court case of *Hong Leong Bank Bhd v. Staghorn Sdn Bhd & Other Appeals* [2008] 2 CLJ 121, at 149-150 (Staghorn Sdn Bhd) as follows:

[43] Considering all these authorities, my conclusion is that an application to intervene under O. 15 r. 6(2) of the RHC 1980 must be before judgment. **To set aside an order or judgment, there must be a provision in the Rules that can be relied on for the purpose. This is provided for in O. 42 r. 13 of the RHC 1980**: …

[44] Examples of such provisions are O. 13 r. 8, O. 14 r. 11, O. 70 r. 18(6) and 20(9) and O. 81 r. 7 of the RHC 1980. In other cases, setting aside may only be done by a fresh action - see *Hock Hua Bank Bhd. v. Sahari bin Murid* [1980] 1 LNS 92.

(emphasis added).

Abdul Hamid Mohamad CJ's judgment in *Staghorn Sdn Bhd*, at p. 163 and 190, has been concurred by Azmel Haji Maamor FCJ. The above judgment concerned O. 42 r. 13 of the Rules of the High Court 1980 (RHC) which is similar (not identical) to the present O. 42 r. 13 RC.

[20] In this case, court encl. No. 32 complies with the 30-day period stipulated in O. 42 r. 13 RC as court encl. No. 32 is filed on 14 May 2014, eight days after the court order dated 6 May 2014.

[21] I must pause here to note that there is nothing in this judgment which concerns a party filing a fresh action to set aside a court order or judgment. This court has earlier granted the court order dated 6 May 2014 and court encl. No. 32 has been filed by the defendant in the same court which gave the court order dated 6 May 2014.

[22] The next question that arises is whether the plaintiff has complied with the O. 32 r. 3 RC in obtaining the court order dated 6 May 2014. Order 32 r. 3 RC provides as follows:

Service of notice of application (Order 32 rule 3)

3. A notice of application asking only for the extension or abridgement of any period of time may be served on the day before the day specified in the notice of application for the hearing thereof but, except as aforesaid and **unless the Court otherwise orders or any**

of these rules otherwise provides, a notice of application shall be served on every other party not less than two clear days before the day so specified.

(emphasis added).

How To Reckon Time Period Stipulated In O. 32 r. 3 RC?

[23] Order 3 r. 2 RC reads as follows:

Reckoning periods of time (Order 3 rule 2)

2(1) **Any period of time fixed by these Rules or by any judgment, order or direction for doing any act shall be reckoned in accordance with the following provisions of this rule.**

(2) **Where an act is required to be done within a specified period after or from a specified date, the period begins immediately after that date.**

(3) **Where an act is required to be done within or not less than a specified period before a specified date, the period ends immediately before that date.**

(4) **Where an act is required to be done within a specified number of clear days before or after a specified date, at least that number of days must intervene between the day on which the act is done and that date.**

(5) **Where, apart from this paragraph, the period in question, being a period of seven days or less, would include the day before the weekly holiday or public holiday, that day shall be excluded.**

(emphasis added).

[24] Order 3 r. 2 RC is similar to O. 3 r. 2 RHC. Accordingly, I will refer to cases which have construed O. 3 r. 2 RHC.

[25] Order 3 r. 2(1) RC expressly provides that any time period fixed by RC "shall" be construed in accordance with O. 3 r. 2 RC. As such, s. 54(1) of the Interpretation Acts 1948 and 1967 (IA) cannot apply to reckon the two clear days' time period specified in O. 32 r. 3 RC. This is clear from the following High Court cases:

(a) VC George J (as His Lordship then was) decided as follows in *Morgan Guaranty Trust Co of New York v. Lian Seng Properties Sdn Bhd & Anor* [1989] 1 CLJ 452; [1989] 2 CLJ (Rep) 133; [1989] 3 MLJ 172, at 174 (Morgan Guaranty Trust Co):

Encik PS Gill submitted that the reckoning of time has to be done on the basis provided by the Interpretation Act. However, as was pointed out by Encik Murthi, s 2(3) of the Interpretation Act does provide that the Act applies only if no other provisions are available. The extension of time given by the plaintiff's solicitors was pursuant to the power to do so given by O 3 r 5(3) and accordingly

the specific provision for reckoning of time given in the RHC will apply in preference to the general rules of reckoning given in the Interpretation Act. Accordingly O. 3 r. 2(5) applies.

(emphasis added); and

(b) Abdul Hamid Mohamad J's (as His Lordship then was) judgment in *Credit Corporation Malaysia Bhd v. Saraswathi Narayanan & Ors* [1999] 7 CLJ 459, at 462 (*CCM*'s case).

The above two High Court cases is supported by s. 2(3)(a) IA which provides that Part I of IA (which includes s. 54 IA) does not apply if there is an "express provision to the contrary". Order 3 r. 2 RC is the "express provision to the contrary".

Despite the above two High Court cases, the following cases applied s. 54(1) IA in computing time periods prescribed by the then RHC:

(i) in the Court of Appeal case of *RIH Services (M) Sdn Bhd v. Tanjung Tuan Hotel Sdn Bhd* [2002] 3 CLJ 83; [2002] 3 MLJ 1, at 6, Abdul Hamid Mohamad JCA (as His Lordship then was) applied both O. 3 r. 2(2) RHC and s. 54(1)(a) IA to interpret the 21 days' time period specified in O. 29 r. 1(2B) RHC; and

(ii) the judgment of RK Nathan J in *Aje Best-On Sdn Bhd v. YB Ahmad Omar & Anor* [2000] 3 CLJ 515, at 517-518.

[26] Mr Siew had submitted persuasively that O. 32 r. 3 RC had been complied in this case as court encl. No. 30 had been served on Wednesday, 30 April 2014 and even if the public holiday (Thursday, 1 May 2014) and the weekend (3 May 2014 and 4 May 2014) were excluded, there was nonetheless due service of court encl. No. 30 of not less than two clear days before court encl. No. 30 was heard on Tuesday, 6 April 2014.

[27] I am of the following view regarding the reckoning of the two clear days' time period stipulated in O. 32 r. 3 RC:

(a) the construction of O. 32 r. 3 RC based on O. 3 r. 2 RC is a question of law which is not dependent on the telephone conversation;

(b) Order 3 r. 2(2) RC excludes 30 April 2014 (the day of service of court encl. No. 30 on AGC) from the computation of the two clear days' time period. I rely on Abdul Hamid Mohamad JCA's (as His Lordship then was) judgment in the *RIH Services (M) Sdn Bhd*, at p. 6, as follows:

It should be noted that O. 29 r. 1(2B) of the RHC talks about 'at the end of 21 days from the date on which it is granted'. **Both O. 3 r. 2(2) of the RHC and s. 54(1)(a) of the Interpretation Acts 1948 and 1967 require that the day the order is made to be excluded in reckoning the 21 days**.

(emphasis added)

A similar interpretation of O. 3 r. 2(2) RHC (similar to O. 3 r. 2(2) RC) has been given by Steve Shim J (as His Lordship then was) in the High Court case of *Arab-Malaysian Bank Bhd v. Marina Mohd Yusoff* [1999] 3 CLJ 633, at 637-638;

(c) it is clear that O. 3 r. 2(5) RC excludes 'public holiday' from the computation of a period of seven days or less. 'Public holiday' is provided in s. 3 of the Holidays Act 1951 (HA) as follows:

> 3. The several days mentioned in the First Schedule shall, except as hereinafter provided, be public holidays:
>
> Provided that, save and except where:
>
> (a) the State Authority in the case of any State; or
>
> (b) the Minister in the case of Federal Territory, by notification in the Gazette otherwise provides, if any such public holiday shall fall on a weekly holiday in any State or in the Federal Territory, then the day following shall be a public holiday and if such day is already a public holiday, then the day following shall be a public holiday.

Section 3 IA defines 'public holiday' as a public holiday established by law in Malaysia or any part of Malaysia. Based on O. 3 r. 2(5) RC, the public holiday on 1 May 2014 is excluded in the reckoning of two clear days' time period prescribed in O. 32 r. 3 RC;

(d) section 2 HA interprets 'weekly holiday' to mean "Sunday or, in States where Friday is observed as the weekly holiday, Friday". Section 3 IA gives the same definition of a 'weekly holiday'. I adopt the meaning of 'weekly holiday' in s. 2 HA and s. 3 IA for the purpose of the construction of 'weekly holiday' in O. 3 r. 2(5) RC. As such, Saturdays are not 'weekly holidays' under O. 3 r. 2(5) RC even though Saturdays are generally not working days and the court 'Registry' (defined in O. 1 r. 4(1) RC) is closed on Saturdays (please see below in respect of the court's judicial notice of these facts);

(e) there is an ambiguity in respect of whether O. 3 r. 2(5) RC excludes a Saturday or not in the reckoning of a period of seven days or less.

One interpretation of O. 3 r. 2(5) RC is that Saturdays are included in the computation of a period of seven days or less (first interpretation). The first interpretation is illustrated in *Aje Best-On Sdn Bhd*, at pp. 517-518, where the High Court decided in respect of O. 3 r. 2(5) RHC (similar to O. 3 r. 2(5) RC) as follows:

> It is relevant therefore now to consider O. 3 r. 2(5) of the RHC which reads as follows: ...

Section 54(1)(b) [IA] is also relevant. It reads as follows: ...

Therefore it is clear from these two authoritative guidelines that since the last date for filing the notice of appeal falls on the 11th being a Sunday, then I shall have to, pursuant to O. 3 r. 2(5), exclude the 11th from the computation and pursuant to s. 54(1)(b) [IA], include the next following day into the computation of the days to be counted for filing the notice of appeal. This means that the last day for filing the notice of appeal was 12 April 1999. Since the notice was filed on 13 April 1999 it is out of time.

Counsel for the appellant argued that pursuant to O. 3 r. 2(5) of the RHC, I should, in computing the days, also exclude "the day before the weekly holiday". In other words, he wanted me to exclude 10 April which was a Saturday from the computation. If he is correct in his submission then clearly he is on time when he filed the notice of appeal on 13 April. But that is not how this sub-r. (5) is to be interpreted. Where the period to be calculated would include the day before the weekly holiday, then in computing the required number of days so long as it is seven days or less, the court ought not to exclude in its calculation, that day before the weekly holiday. In other words, in so far as this case is concerned, the court ought to include the Saturday in its calculation and which means that the required five days would end on Monday, 12 April 1999.

Since the plaintiff insisted on his calculation and did not seek the court's indulgence for an extension of time to file the notice of appeal, I upheld the preliminary objection and dismissed the appeal with costs.

(emphasis added).

The preponderance of High Court cases interpret O. 3 r. 2(5) RHC to exclude Saturdays from the reckoning of a period of seven days or less (second interpretation). The following judgments (in chronological order) adopt the second interpretation:

(i) *Morgan Guaranty Trust Co*, at p. 174:

Now, 23 March 1987 was a Monday. *Accordingly there was a Saturday and a Sunday within the seven days' extension granted by the plaintiff's solicitors which two days have, by virtue of O 5 r 2(5), to be excluded from the reckoning which has the result that the seven days end on 2 April 1987 which in turn means that the defendants had until 2 April 1987 (inclusive of that date) to file the defence*.

(emphasis added);

(ii) *CCM*'s case, at p. 462:

We now come back to the seven-day period from the respective dates of service of the *ex parte* order on the defendants for them to comply with the order. This depends on the answer to the question, even though it sounds illogical, how many days are there in 'seven days'?

Order 3 r. 2(5) of the RHC 1980 provides: ...

This provision was adopted with modifications from the English O. 3 r. 2(5) which reads as follows:

> (5) **Where, apart from this paragraph, the period in question, being a period of 7 days or less, would include a Saturday, Sunday or bank holiday, Christmas Day or Good Friday, that day shall be excluded**.

It is to be noted the words "the day before the weekly holiday" have been substituted for the word "Saturday". This is understandable because in Malaysia some states have Sundays and some have Fridays as their weekly holidays. So, the term "the day before the weekly holiday" means either a Saturday or a Thursday depending on the day the public holiday falls in that particular state. The Court of Appeal in England in Re Display Multiples, Ltd [1967] 1 All ER 685 has decided, pursuant to the English O. 3 r. 2(5) that Saturday and Sunday are to be excluded in computing the period of seven days. In *Morgan Guaranty Trust Company of New York v. Lian Seng Properties Sdn Bhd* [1989] 1 CLJ 452; [1989] 3 MLJ 172 VC George J (as he then was) has given the same interpretation to our rule. *I have no doubt that both decisions, based on similar wordings, are correct. The drafters of the Malaysian Rules have adopted the wording of the English Rules. The words are clear and should be given effect to. Of course one wonders whether when that rule was drafted it was considered that unlike Malaysia, England has a five-day week. Whatever it may be, it is clear that the rule provides that in computing a period of seven days and that period includes a Thursday and a Friday or a Saturday and a Sunday, depending in which state the order is made, two days will be added. So, in law, 7 = 9 but 8 = 8.*

(emphasis added);

(iii) in *Bank Utama (Malaysia) Bhd v. Seri Mayhua Sdn Bhd & 3 Ors* [2000] 1 LNS 82; [2001] 5 MLJ 169, at 172-173, Sulaiman Daud JC (as His Lordship then was) held as follows:

> Order 3 r 2 of the RHC provides for the reckoning of periods of time under the RHC. As the period for the issuance of the notice of appeal under O 56 r 1(3) is less than seven days, the provisions of O 3 r 2(2) and (5) of the RHC shall apply in reckoning the time limit prescribed thereunder.
>
> ...
>
> Learned counsel for the respondent contended that the five days period for the issuance of the notice of appeal should run from 8 April 2000, as that day is a Friday and not a weekly holiday or public holiday and since the notice of appeal was issued on 13 April 2000, it had exceeded the five days limit prescribed therefor by one day. Learned counsel for the appellant, on the other hand, contended that in reckoning the period in question, 8 and 9 April 2000, being the day before a weekly holiday and a weekly holiday respectively, should be excluded. It is not disputed that 9 April 2000 which falls on Sunday is the weekly holiday for the state of Sarawak and should be excluded by virtue of O. 3 r. 2(5) of the RHC in reckoning the five days period within which the notice of appeal should be issued. Having excluded

> the said 9 April 2000, it is clear that the notice of appeal was issued within the prescribed period and as such I can dismiss the preliminary objection on this ground alone. Further, I also agree with the learned counsel for the appellant that 8 April 2000, being the day before a weekly holiday, should also be excluded in reckoning the said period.
>
> (emphasis added); and

(iv) Low Hop Bing J (as His Lordship then was) decided as follows in *Re Stephen Wong Leong Kiong; Ex P HSBC Bank Malaysia Bhd* [2005] 5 CLJ 504, at 508-509:

> The reckoning of a period of time is provided for in O. 3 r. 2(1), (2) and (5) of the RHC in the following words:
>
> ...
>
> In my view, under O. 3 r. 2(2), the day on which an act is required to be done within a specified period after or from a specified date, that day itself shall be excluded from the reckoning of the period of time, whether it was a period of eg, thirty days, or seven days as in the instant appeal.
>
> **Specifically, where the period for reckoning is a period of seven days or less, O. 3 r. 2(5) provides for the exclusion of each of the following days**:
>
> (a) **the day before the weekly holiday;**
>
> (b) **the weekly holiday; or**
>
> (c) **public holiday.**
>
> **The exclusion is intended to ensure that the reckoning of the short period of seven days or less would only include clear working or office days so that the aforesaid excluded days would not be reckonable days.**
>
> In this respect, I am mindful of two High Court decisions which considered O. 3 r. 2(5) and which deserve further discussion.
>
> In *AJE Best-On Sdn Bhd v. YB Ahmad Omar & Anor* [2000] 3 CLJ 515, the plaintiff's application for summary judgment was dismissed by the registrar on Tuesday 6 April 1999. Under O. 56 r. 1(3), the notice of appeal to judge in chambers must be issued within five days of the dismissal. The plaintiff filed a notice of appeal on 13 April 1999, but the defendant raised a preliminary objection that it was filed out of time. The plaintiff's submission was that pursuant to O. 3 r. 2(5), "the day before the weekly holiday" ie, a Saturday in Penang should be excluded so that the notice of appeal was on time. **RK Nathan J did not accept that submission, and instead included 10 April, a Saturday in the computation of the five days**.
>
> ...

A On the other hand, in *Bank Utama (M) Bhd v. Seri Mayhua Sdn Bhd & Ors* [2001] 5 MLJ 169, the notice of appeal to judge in chambers, pursuant to O. 56 r. 1, was issued on Thursday 13 April 2000 while the decision was made on Friday 7 April 2000. A similar objection was raised that the notice of appeal was issued out of time. *Sulaiman JC (now J) held that 8 April 2000 being the day before a weekly holiday should* B *be excluded, as well as 9 April 2000 which was a Sunday, so that the notice of appeal was issued on time, the reckonable days being 10, 11, 12 and 13 April. The learned judge rejected the defendant's contention that the five-day period should run from 8 April 2000, as that was a Saturday and not a weekly holiday and since the notice of appeal was issued on 13 April 2000, it had exceeded the five days prescribed therefor by one day. With the utmost respect,* C *I would agree with the decision of Sulaiman JC (now J) in relation to the exclusion of Saturday being the day before the weekly day, under the clear provisions of O. 3 r. 2(5); and respectfully decline to follow the decision of RK Nathan J to the contrary*.

(emphasis added);

D

(f) I am in favour of the second interpretation for the following reasons:

(i) for States where Sunday is the weekly holiday, a literal interpretation of the phrase "where ... the period in question ... would include the day before the weekly holiday ..., that day shall E be excluded" in O. 3 r. 2(5) RC supports the exclusion of a Saturday (the day before the weekly holiday of Sunday) from the reckoning of the period of seven days or less. This literal interpretation of O. 3 r. 2(5) RC does not apply to States where Friday is a weekly holiday; and

F (ii) in *Pembangunan Maha Murni Sdn Bhd v. Jururus Ladang Sdn Bhd* [1985] 1 LNS 122; [1986] 2 MLJ 30, at 31-32, Syed Agil Barakbah SCJ delivered the Supreme Court's judgment in respect of what matter which the court may take judicial notice:

G Now, the general rule is that all facts in issue and relevant facts must be proved by evidence. **There are, however, two classes of facts which need not be proved, *viz*. (a) facts judicially noticed** and (b) facts admitted. *The exceptions are dealt with by sections 56, 57 and 58 of the Evidence Act 1950 under the title "Facts which need not be proved." In so far as judicial notice is concerned, the provisions of section 57 subsection (1) makes it mandatory for the Court to take judicial* H *notice of all laws and regulations having the force of law, public Acts passed by Parliament, the course of parliamentary proceedings and other matters that are enumerated in subsection (1) (a) to (o) of the section. The list however is not exhaustive since it is impossible to make a really complete list although a long list of facts which the English courts take judicial notice has been prepared. The important point to note is that* I *section 57 does not prohibit the courts from taking judicial notice of other facts not mentioned therein. The matter which the Court will take judicial notice must be the subject of common and general knowledge and its*

> *existence or operation is accepted by the public without qualification or contention. The test is that the facts involved must be so sufficiently notorious that it becomes proper to assume its existence without proof.*
>
> (emphasis added).

Based on *Pembangunan Maha Murni Sdn Bhd*, the fact that Saturdays are ordinarily not working days in Malaysia is "the subject of common and general knowledge and its existence or operation is accepted by the public without qualification or contention". Such a fact is "sufficiently notorious" for me to take judicial notice. I can also take judicial notice that the court registry is closed on Saturdays. If parties and solicitors generally do not work on Saturdays and the court's registry is also closed on Saturdays, it will be unjust to include Saturdays in the computation of a time period of seven days or less. Accordingly, I will adopt a purposive interpretation of O. 3 r. 2(5) RC to exclude Saturdays from the reckoning of a time period of seven days or less;

(g) applying the second interpretation (to exclude Saturday, 3 May 2014, from the computation of two clear days' period), O. 3 r. 2(4) RC has been complied with in this case. This is because at least two 'working days' (Friday (2 May 2014) and Monday (5 May 2014)) have intervened between the day of service of court encl. No. 30 on AGC (Wednesday, 30 April 2014) and its hearing (on Tuesday, 6 May 2014); and

(h) Order 3 r. 2(5) RSC provides as follows:

> Where, apart from this paragraph, the period in question, being a period of 7 days or less, would include a Saturday, Sunday or bank holiday, Christmas Day or Good Friday, that day shall be excluded.
>
> In this paragraph 'bank holidays' means a day which is, or is to be observed as, a bank holiday, or a holiday, under the Banking and Financial Dealings Act 1971, in England and Wales.

Rule 2.8(4) of the present English Civil Procedure Rules (CPR) reads as follows:

> 2.8(4) Where the specified period:
>
> (a) is 5 days or less; and
>
> (b) includes:
>
> (i) a Saturday or Sunday; or
>
> (ii) a Bank Holiday, Christmas Day or Good Friday, that day does not count.

A

Example

Notice of an application must be served at least 3 days before the hearing.

An application is to be heard on Monday 20 October.

B The last date for service is Tuesday 14 October.

Order 3 r. 2(5) RC is materially different from O. 3 r. 2(5) RSC and r. 2.8(4) CPR. Hence, English cases on O. 3 r. 2(5) RSC and r. 2.8(4) CPR, in my view, should be read with caution. It is my hope that the Rules Committee may amend O. 3 r. 2(5) RSC to make it clear C that Saturdays are excluded from the reckoning of time period of seven days or less as required by RC.

[28] Based on the above interpretation of O. 3 r. 2 RC, I accept Mr Siew's contention that court encl. No. 30 has been duly served on AGC as required by O. 32 r. 3 RC as interpreted by O. 3 r. 2(1), (2), (4) and (5) RC. As such, D court encl. No. 32 cannot succeed under O. 2 r. 2(1) RC as the court order dated 6 May 2014 has been obtained regularly by the plaintiff.

Should Court Re-hear Court Encl. No. 30 Under O. 32 r. 5(3) RC?

[29] I am not able to find any Malaysian case which has interpreted O. 32 E r. 5(3) RC. In *United Malayan Banking Corp Bhd v. Syarikat Perumahan Lunas Sdn Bhd* [1988] 1 LNS 143; [1988] 1 MLJ 546, at 546-548 (*UMBC*'s Case):

(a) the plaintiff bank had duly served on the defendant an originating summons (OS) to apply for an order for the sale of the defendant's land charged to the plaintiff bank (charged land);

F

(b) the defendant did not enter appearance in the OS and was absent for the hearing of the OS;

(c) the High Court ordered the sale of the charged land (order for sale of charged land); and

G

(d) the defendant applied to set aside the order for sale of charged land and the plaintiff bank raised a preliminary objection that the High Court is *functus officio* after the perfection of the order for sale of charged land and the defendant should have appealed to the Supreme Court against the order for sale of charged land.

H

[30] In *UMBC*'s case, at pp. 547-548, Edgar Joseph Jr J (as His Lordship then was) held as follows:

In reply, counsel for the defendant contended that an order made on an originating summons, even though duly served on a defendant, who fails to enter an appearance and is absent at the hearing is, nevertheless, an I *ex parte* order. My attention was drawn to the Singapore Court of Appeal case of *United Overseas Bank Ltd v. Chung Khiaw Bank Ltd* [1968] 2 MLJ 85 where Chua J., delivering the judgment of the court, said this:

The first question for consideration is whether or not the order made on the originating summons was an *ex parte* order and comes within Order LIII rule 4(1).

The originating summons in this case was served on Tay Soo Tong by substituted service and he had made no appearance and in such a case Order LI rule 16 provides:

> Where any party who had been duly served fails to attend at the time appointed for the hearing, the judge may proceed *ex parte*, if he thinks it expedient to do so, and may require such evidence of service as he thinks fit.

It is clear then that a judge may proceed *ex parte* to hear an application where a party duly served fails to appear at the time appointed for the hearing. An application so heard in the absence of a party is not an *ex parte* application. It is the hearing which is *ex parte* and an order made on such a hearing is an *ex parte* order within the terms of Order LIII rule 4(1).

Order LIII rule 4(1) of the Singapore Rules of the Supreme Court, then in force, was as follows:

> Any order made *ex parte* may be varied or set aside on application, by any person affected by it, to a judge, on such terms as to costs or otherwise as to the judge seems fit.

The relevant Singapore rule would thus seem to be generally *in pari materia* with Order 28 rule 4(1) [RHC], which provides:

> *The court by whom an originating summons is heard may, if the liability of the defendant to the plaintiff in respect of any claim made by the plaintiff is established, make such order in favour of the plaintiff as the nature of the case may require, but where the court makes an order under this paragraph against a defendant who does not appear at the hearing, the order may be varied or revoked by a subsequent order of the court on such terms as it thinks just*.

On this basis, it was argued that the defendant's application was perfectly competent and the court was not functus officio but had full powers to vary or revoke the order of sale if it deemed fit to do so having regard to the provisions of Order 28 rule 4(1) [RHC].

In any event, it was argued that when, as here, the defendant was contending that the order of sale was a nullity, the court could, in the exercise of its inherent jurisdiction, set aside its own order and an appeal was therefore unnecessary. In support of this latter proposition the following passage in the judgment of Greene M.R. in *Craig v. Kanseem* [1943] 1 All ER 108 at 113 was cited to me:

> ... Those cases appear to me to establish that an order which can properly be described as a nullity is something which the person affected by it is entitled *ex debito justitiae* to have set aside. So far as the procedure for having it set aside is concerned, it seems to

A me that the court in its inherent jurisdiction can set aside its own order; and that an appeal from the order is not necessary. I say nothing on the question whether an appeal from the order, assuming that the appeal is made in proper time, would not be competent.

B **For the reasons urged by counsel for the defendant, I had no hesitation in overruling the preliminary objection.**

I might as well add that I did not consider that Order 32 rule 5(3) [RHC], which provides:

...

C *and relied upon by counsel for the plaintiff, had any relevance to the issue which arose before me because I was not concerned here with an application to re-hear a summons but an application to revoke an ex parte order*. Nor, for that matter, did I consider the case of *Hamzah bin Abdul Majid and Anor v. Sungei Way Leasing Sdn Bhd* [1986] 1 MLJ 471 of any D relevance because there the decision in question was one arrived at after an *inter partes* hearing so that Order 28 rule 4(1) was without application.

In the circumstances, I directed that the hearing of the application should proceed on the merits.

E (emphasis added)

[31] I am of the following respectful view regarding *UMBC*'s case:

(a) the High Court set aside the order for sale of charged land under the then O. 28 r. 4(1) RHC which allowed the court to vary or revoke the order F for sale of charged land made in the absence of the defendant. The present O. 28 r. 4(1) RC is not identical to O. 28 r. 4(1) RHC and provides as follows:

4(1) *The Court hearing an originating summons may, if the liability of the defendant to the plaintiff in respect of any claim made by the plaintiff is established, make such order in favour of the plaintiff as the nature of the case* G *may require, but where the Court makes an order under this paragraph against a defendant who does not appear at the hearing, the Court, if satisfied that it is just to do so, may rehear the originating summons.*

(emphasis added);

H (b) the High Court did not decide in *UMBC*'s case on O. 32 r. 5(3) RHC (similar to O. 32 r. 5(3) RC); and

(c) once the OS has been duly served on a defendant, the court may hear the OS in the defendant's absence under O. 28 r. 4(1) RC and such a hearing is an *inter partes* and not an *ex parte* proceeding – please see the I above Court of Appeal's judgment in *Lee Lim Huat*, at p. 209.

[32] The *functus officio* doctrine as decided by case law, provides that a court has no jurisdiction or power to re-visit, vary or revoke an earlier order or judgment which has been perfected. In *Staghorn Sdn Bhd*, at p. 154, Abdul Hamid Mohamad CJ explained the application of the *functus officio* doctrine as follows:

> [58] First, an application to set aside an order for sale by an existing party to the proceeding may be made before the final order is perfected, otherwise the judge is *functus officio*.

[33] Order 32 r. 5(3) RC, in my view, is a statutory exception to the *functus officio* doctrine. This is clear from the words "whether or not an order made on the hearing has been perfected" in O. 32 r. 5(3) RC. Order 32 r. 5(3) RC expressly confers power on the court to re-hear a NA provided that the two following conditions (two conditions) are fulfilled:

(a) the order in question has been made in the absence of a party (first condition); and

(b) it is just for the court to re-hear the NA in question (second condition). There is nothing in O. 32 r. 5(3) RC which states that the court may set aside the court order dated 6 May 2014. I am of the opinion that if the two conditions are met, the court has the 'reasonably necessary' power to set aside the court order dated 6 May 2014. My view is premised on the following reasons:

(i) Part I of IA applies to RC by virtue of s. 2(1)(e) IA. This is because RC constitutes a subsidiary legislation made after 31 December 1968 under the Courts of Judicature Act 1964 (which has been revised under the Revision of Laws Act 1968); and

(ii) section 40(1) IA (in Part 1 of IA) provides as follows:

> 40(1) **Where a written law confers a power on any person to do or enforce the doing of any act or thing, all such powers shall be understood to be also given as are reasonably necessary to enable the person to do or enforce the doing of the act or thing**.
>
> (emphasis added).

If the two conditions are fulfilled in this case, s. 40(1) IA confers power on this court to do whatever is 'reasonably necessary' to re-hear court encl. No. 30 pursuant to O. 32 r. 5(3) RC. This court can only re-hear court encl. No. 30 if the court order dated 6 May 2014 is revoked. In *Indah Water Konsortium Sdn Bhd v. Yong Kon Fatt* [2007] 4 CLJ 613, at 636, the Court of Appeal has applied s. 40(1) IA.

[34] I am satisfied that two conditions have been met in this case:

(a) The first condition is fulfilled as the defendant is absent when the court order dated 6 May 2014 is pronounced; and

(b) It is just to set aside the court order dated 6 May 2014 and to re-hear court encl. No. 30 because:

(i) the defendant should be given an opportunity, if not a right, to explain why the certificate should not be issued against the defendant, especially when the defendant has already paid to the plaintiff a substantial portion of the judgment sum (a total of RM66,312,709.50), leaving only an unpaid balance sum of RM1,762,635.39 as at 12 December 2014;

(ii) 6 May 2014 was the first hearing date of court encl. No. 30. Under O. 32 r. 13(2)(b) RC, the defendant has 14 days (14 days' period) to file and serve an affidavit to reply to court encl. No. 30 and the plaintiff's affidavit in support thereof. There was no compelling reason why court encl. No. 30 had to be heard on the very first hearing date, especially when the defendant was still within the 14 days' period. Nor was there any reason why a short adjournment of court encl. No. 30 could not be given by the court with the court's direction to the plaintiff's solicitor to inform AGC that the court would proceed to hear court encl. no. 30 on the next hearing date without any further postponement; and

(iii) there is no prejudice to the plaintiff if this court set aside the court order dated 6 May 2014 and re-hear court encl. No. 30:

(1) the Court of Appeal's judgment is final and *res judicata* in the sense that the defendant cannot re-visit and challenge the validity of the Court of Appeal's judgment – please see the Supreme Court's judgment in *Asia Commercial Finance (M) Bhd v. Kawal Teliti Sdn Bhd* [1995] 3 CLJ 783; [1995] 3 MLJ 189, at 197-198, 198-199 and 199-200, regarding the application of the "cause of action estoppel doctrine" and "issue estoppel doctrine"; and

(2) irrespective of the delay in the disposal of court encl. no. 30, post-judgment interest continues to accrue in the plaintiff's favour until the defendant's full payment of the judgment sum to the plaintiff.

[35] During the hearing of court encl. No. 32 on 6 November 2014:

(a) in the finest tradition of the Bar, Mr Siew properly and magnanimously concede to a re-hearing of court encl. No. 30 under O. 32 r. 5(3) RC; and

(b) consequently, this court:

(i) allowed court encl. no. 32 and set aside the court order dated 6 May 2014 with no order as to costs; and

(ii) ordered court encl. no. 30 to be re-heard on 19 December 2014 with no further adjournment of court encl. no. 30.

Happy Ending To Court Encl. No. 30

[36] When court encl. no. 30 was re-heard on 19 December 2014:

(a) both parties informed the court that a substantial portion of the balance sum had been paid by the defendant to the plaintiff;

(b) the plaintiff did not intend to proceed with court encl. no. 30; and

(c) this court exercised its discretion under O. 21 r. 6 RC to strike out court encl. no. 30 with no order as to costs and with no liberty to the plaintiff to file a fresh similar application (because the defendant has paid to the plaintiff almost the entire judgment sum).

[37] In closing, I must express my gratitude to learned counsel from both parties, in particular Mr Siew, for their helpful written and oral submission, without which this judgment is not possible.